Supreme Court, U.S.
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NO. 83-6281

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, et. al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

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QUESTION PRESENTED

Whether the Supreme Court of Florida denied Petitioner the right to due process under the Fourteenth Amendment to the United States Constitution in its review of Petitioner's conviction and sentence.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA.

OPINIONS BELOW

The order of the Florida Supreme Court summarily denying Petitioner's Petition for Writ of Habeas Corpus is reproduced and attached in the appendix at (RA-1)*. The opinion of the Florida Supreme Court affirming Petitioner's sentence of death is reported at 419 So.2d 1067 (Fla. 1982). This Court's denial of Mr. Daugherty's Petition for Writ of Certiorari to the Supreme Court of Florida to review the decision on direct appeal is recorded at 103 S.Ct. 1236(1983).

JURISDICTION

Review is sought pursuant to 28 U.S.C. Section 1257(3).

*Page references to the appendix to this brief in opposition to Petitioner's Petition for Writ of Habeas Corpus are cited as "RA-."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Petitioner contends that the Fourteenth Amendment to the United States Constitution and Section 921.141 Fla. Stat. are involved. Those provisions are set forth in the appendix at (RA-2).

PRELIMINARY STATEMENT

Petitioner alleges that the Florida Supreme Court's summary denial of his petition for writ of habeas corpus below raises an important question of federal constitutional law concerning the extent to which the denial of State-created procedural rights to specific capital sentencing protections implicates the due process provision of the Fourteenth Amendment. Specifically, Petitioner maintains that in this case, the Florida Supreme Court disregarded these procedures in three important respects. First, Petitioner alleges that the Florida Supreme Court failed to conduct any proportionality review of Petitioner's death sentence, either on direct appeal or during the habeas corpus proceedings which specifically sought such review. Second, Petitioner alleges that the Florida Supreme Court failed to conduct an independant reweighing of the statutory circumstances to determine whether the death sentence is genuinely supportable in this case. Thirdly, Petitioner alleges that the Florida Supreme Court failed to have before it and review the entire record on which the lower court based its decision to sentence Mr. Daugherty to death. Petitioner maintains that therefore, the court arbitrarily denied Petitioner the procedural safeguards afforded other capital defendants in Florida.

Respondents contend that the Florida Supreme Court did not fail to conduct a proportionality review of Petitioner's death sentence, either on direct appeal or during the habeas corpus proceedings. Secondly, Respondents submit that the Florida Supreme Court did conduct an independant review of the statutory circumstances to determine whether the death sentence

was genuinely supportable in this case. Third, Respondents submit that the Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner before the Supreme Court of Florida. Therefore, the court did not deny Petitioner the procedural safeguards afforded other capital defendants in Florida.

Respondents would point out that these very issues were raised in substance in Petitioner's first petition for writ of certiorari. In his first petition, Petitioner alleged that he was deprived of meaningful appellate review of his death sentence and that the Florida Supreme Court affirmed his sentence on the basis of an incomplete record. The Respondents argued that the Florida Supreme Court had a complete record before it regarding issues raised by Petitioner in his direct appeal. Furthermore, Respondents pointed out that Petitioner never moved to supplement the record before the court with these missing portions of the transcript provided by Rule 9.200(f), Florida Rules of Appellate Procedure. Additionally, Respondents pointed out that the issue of the missing portions of the transcript were never raised in Petitioner's direct appeal, and only presented "unseasonably late" in a motion for rehearing and clarification. Therefore, review by this Court was precluded. Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 22 L. Ed. 2d 572 (1969), Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161 (1969) and Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981).

Petitioner further alleged in his first petition for writ of certiorari, that the Florida Supreme Court failed to conduct an independant review or to reweigh the evidence of the aggravating and mitigating circumstances to determine whether the imposition of the death penalty is warranted. Petitioner again realleges the same allegation as in the first petition, that the Florida Supreme Court failed to conduct an independant reweighing of the statutory circumstances to determine whether the death sentence is supportable in this case. Respondents pointed out that the court extensively reviewed

Petitioner's claim that the trial court erred in considering prior convictions for offenses occurring subsequent to the instant capital felony as an aggravating circumstance. The court pointed out that this argument had been rejected in previous cases, Elledge v. State, 346 So.2d 998 (Fla. 1977), Lucas v. State, 376 So.2d 1149 (Fla. 1979), King v. State, 397 So.2d 315, 320 (Fla. 1980), cert. denied, 450 U.S. 989, 101 S.Ct. 1529, 67 L.Ed. 2d 825 (1981) and Ruffin v. State, 397 So.2d 277 (Fla. 1981) cert. denied, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed. 2d 194 (1981). See Daugherty v. State, 419 So.2d 1067, 1069 (Fla. 1982).

On direct appeal, Petitioner further contended that the trial court erred in rejecting the statutory mitigating factor of no significant history of prior criminal activity. Daugherty argued that the court erroneously concluded that this mitigating factor did not exist on the basis that Daugherty had previously been convicted of four murders. The trial court noted that Daugherty had also been convicted of three other robberies and two aggravated assaults. Daugherty contended that these crimes were committed after the Sailer murder. However, the state pointed out that one of these convictions was for a murder comitted prior to the Sailer murder. The Florida Supreme Court in its review of this allegation, examined its decision in Ruffin v. State, supra, in which the court held that these prior convictions could be properly considered as a basis for rejecting the mitigating factor. In fact, the Florida Supreme Court extensively reviewed the findings of the trial court regarding the absence of this mitigating factor, and the trial court's rejection of the mitigating factor of age, under the circumstances. See Daugherty at 419 So.2d 1070-1071. Therefore, Respondents submit that Petitioner was not denied an independant reweighing or review of the statutory circumstances to determine whether the death sentence was supportable in this case.

In Petitioner's first petition for writ of certiorari in this Court, Petitioner alleged that the review of his death

sentence was something less than what he was entitled to. Petitioner now alleges that the Florida Supreme Court failed to conduct any proportionality review of his death sentence, either on direct appeal or during the habeas corpus proceedings. Respondents argued in its brief in opposition to the first petition, that this Court should deny the petition on this issue in that the issue was never raised in the court below; and this Court had rejected the same issue in a petition for writ of certiorari to the Florida Supreme Court in Quince v. Florida, 414 So.2d 185, 198 (Fla. 1982), cert. denied, Quince v. Florida, _____U.S._____, 103 S.Ct. 192, 74 L.Ed. 2d 155 (1982). In Pulley v. Harris, _____U.S._____, [34 Cr.L. 3027], this court stated that:

> Needless to say, that some schemes for providing proportionality review are constitutional does not mean that such review is indispensable . . . examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.

Pulley v. Harris, at 34 Cr.L. 3029.

Nevertheless, Petitioner contends that the instant case is distinguishable from Pulley. Respondents contend that the question is whether a state that conducts proportionality review, despite the absence of a statutory requirement, denies a particular defendant equal protection when the court does not explicitly list in its opinion all other death cases the court compared with the instant case. Respondents maintain that this Court's decision in Pulley v. Harris, answered that question in the negative. Respondents maintain that the Florida Supreme Court did conduct proportionality review in its decision to affirm Mr. Daugherty's death sentence. Respondents further submit that the Florida Supreme Court conducts proportionality review in each case involving a death sentence, even if it does not explicitly list in its opinion each death case it compared with the instant case. See Messer v. State, 439 So.2d 875, 879 (Fla. 1983). Accordingly, the order of the Florida Supreme Court denying

Petitioner's petition for writ of habeas corpus should be affirmed.

STATEMENT OF THE CASE

Respondents do not accept Petitioner's statement of the case to the extent that it is unsupported by the record and is argumentative. While much of the procedural history of this case recounted by Petitioner would seem accurate, Respondents would take strong exception to the conclusionary statement that, "Nevertheless, on September 14, 1982, the Florida Supreme Court affirmed Petitioner's death sentence, Daugherty v. State, 419 So.2d 1067, 1071 (Fla. 1982), on the basis of a record that did not include: (1) the trial court sentencing instruction to the jury, (2) arguments of counsel, (3) the jury voir dire, (4) Petitioner's taped confession which was played at the evidentiary hearing."

Respondents would point out that none of the issues in Petitioner's direct appeal involved the court's instructions to the jury, arguments of counsel, jury voir dire, or Petitioner's confession. Petitioner did not challenge the voluntariness of his plea or any confession in his direct appeal. See Daugherty v. State, 419 So.2d at 1069. In a motion for additional time in which to move for rehearing, Petitioner attempted to raise issues that were not raised in his direct appeal. Petitioner, in his first petition for writ for certiorari before this Court raised essentially the exact issues that are the subject of the instant petition. This Court denied that petition on February 22, 1983. See Daugherty v. Florida, 103 S.Ct. 1236 (1983).

Petitioner filed a petition for writ of habeas corpus with the Florida Supreme Court alleging the following:

> I. The court failed to conduct a constitutionally adequate review under the Eighth and Fourteenth Amendments.
>
> A. That the court failed to review the entire record on which the trial court based its decision to sentence petitioner to death.

B. That the court failed to reweigh the evidence of aggravating and mitigating circumstances and make an independent determination that the evidence supports the imposition of the death penalty.

C. That the court failed to conduct any proportionality review.

II. That the court denied petitioner procedural rights under the due process clause of the Fourteenth Amendment by disregarding established procedures for appellate review of capital cases under Florida law.

A. The State of Florida has created rights to certain specific procedures for Appellate Review of capital cases.

1. Entire record.

2. Independent determination.

3. Proportionality review.

B. The state created rights to certain procedures for appellate review of capital cases invoke the procedural due process clause of the Fourteenth Amendment.

The Florida Supreme Court summarily denied the petition.

REASONS FOR NOT GRANTING THE WRIT.

I. The Florida Supreme Court did not deny Petitioner the right to due process under the Fourteenth Amendment in its review of Petitioner's death sentence.

In this Court's decision in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed. 2d 913 (1976), this Court found Section 921.141, Florida Statutes, and all the provisions therein to be in harmony with the dictates of the United States Constitution. In this case, Petitioner is alleging the same grounds as previously alleged in his first petition for writ of certiorari before this Court. Petitioner alleges that the Florida Supreme Court affirmed his sentence of death without engaging in (1) proportionality review, (2) the court did not reweigh the evidence of aggravating and mitigating circumstances and make an independent determination, (3) the court did not review the entire record on which the lower court based its

decision to sentence to death.

A. The Supreme Court of Florida did not deny Petitioner State-created rights to certain specific procedures for Appellate Review of all capital cases.

1. Proportionality Review

Respondents contend that the Florida Supreme Court did not fail to conduct a proportionality review of Petitioner's death sentence, either on direct appeal or during the habeas corpus proceedings. Secondly, Respondents submit that the Florida Supreme Court did conduct an independent review of the statutory circumstances to determine whether the death sentence was supportable. Thirdly, Respondents submit the Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner before the Supreme Court of Florida. Therefore, the Florida Supreme Court did not deny Petitioner the procedural safeguards afforded other capital defendants in Florida.

The Supreme Court of Florida did not deny Petitioner any state created rights to certain specific procedures for appellate review of capital cases. See McCaskill v. Williams, 344 So.2d 1276, 1280 (Fla. 1977). See also Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981), cert. denied, 454 U.S. 1,000 (1981). Respondents further submit that the Florida Supreme Court conducts proportionality review in each case involving a death sentence, even if it does not explicitly list in its opinion each death case it compared with the instant case. See Messer v. State, 439 So.2d 875, 879 (Fla. 1983).

In Pulley v. Harris, supra, this Court stated that, "Needless to say, that some schemes providing proportionality review are constitutional does not mean that such review is indispensible. . . Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutionality requirement." Pulley v. Harris, 34 Cr.L. at 3029. Nevertheless, Petitioner contends that the instant case

is distinguishable from Pulley. Respondents contends that the question before this Court is whether a state that conducts proportionality review, despite the absence of a statutory requirement, denies a particular defendant equal protection when the court does not explicitly list in its opinion all other death cases the court compared with the instant case. Respondents submit that this Court's decision in Pulley v. Harris, answered that question in the negative. Respondents maintain that the Florida Supreme Court did conduct proportionality review in its decision to affirm Mr. Daugherty's death sentence. See Daugherty v. State, 419 So.2d 1067, 1069 (Fla. 1982). Respondents further submit that the Florida Supreme Court conducts proportionality review in each case involving a death sentence even if it does not explicitly list in its opinion each death case it compared with the instant case. See Messer v. State, 439 So.2d 875, 879 (Fla. 1983).

In Pulley v. Harris, this Court noted that in many of the decisions cited by Justice Stevens in his concurring opinion are decisions in which the Florida Supreme Court reversed the death sentence by examining the circumstances of the particular case; proportionality review would therefore have been superfluous. And the fact that in others the court was not explicit about comparative review does not mean none was undertaken. Messer v. State, 439 So.2d 875, 879 (Fla. 1983) (acknowledging proportionality review requirement, but rejecting "the assertion that in our written opinion we must explicitly compare each death sentence with past capital cases"). Pulley v. State, supra, N.8 at 34 Cr.L. 3030.

In Proffitt v. Florida, and Gregg v. Georgia, 428 U.S. 153 (1976), this Court did not hold that comparative proportionality review is a mandated component of a constitutionally acceptable capital sentencing system. This Court's decisons recognized that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual jury's and judges.

Citing Zant v. Stephens, ___U.S.____ (1983), in Pulley, supra, the court stated that while emphasizing the importance of mandatory appellate review under the Georgia statute, we did not hold that without comparative proportionality review the statute would be unconsitutional. To the contrary, we relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence. (emphasis added). Thus, the emphasis was on the constitutionally necessary narrowing function of statutory aggravating circumstances. Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required. Pulley, supra, at 34 Cr.L. 3031.

Accordingly, Respondents submit that in a state that conducts proportionality review, despite the absence of a statutory requirement, does not deny a particular defendant equal protection when that court does not explicitly list in its opinion all other death cases the court compared to the instant case. Additionally, Respondents further maintain that if proportionality review is not constitutionally required of a state whose statute specifically provides for proportionality review, Gregg v. Georgia, and Zant v. Stephens; then there can be no basis for holding that comparative proportionality review is required in a state whose statute does not require proportionality review. Indeed, in Pulley, this court held; "There is thus no basis. . . for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it. Pulley, supra, at 34 Cr. L. 3031. Like the California statute in Pulley v. Harris, the Florida Statute does not require a comparative proportionality review or otherwise describe the nature of the appellate review. Accordingly, Pulley is dispositive of this issue before the court.

2. Independent Determination.

Respondents maintain that the Florida Supreme Court did conduct an independant determination of whether substantial competent evidence existed to warrant the imposition of the death penalty under the circumstances. In Petitioner's direct appeal, Petitioner claimed that the trial court erred in considering his prior convictions for offenses occurring subsquent to the instant capital felony as an aggravating circumstance. The Florida Supreme Court pointed out that this argument had been rejected in previous cases (citations omitted). See Daugherty v. State, 419 So.2d at 1069. Furthermore, in his direct appeal, Petitioner contended that the trial court erred in rejecting the statutory mitigating factor of no significant prior criminal activity. Petitioner argued that the trial court erroneously concluded that this mitigating factor did not exist on the basis that he had previously been convicted of four murders. The trial court noted that Petitioner had also been convicted of three other robberies and two aggravated assaults. Petitioner contended that these crimes were committed after the murder in the instant case. However, the state pointed out that one of these convictions was for a murder committed prior to the Sailer murder. The Florida Supreme Court in its review of this allegation, examined its decision in Ruffin v. State, supra, in which the court held that these prior convictions could be properly considered as a basis for rejecting this mitigating factor. In fact, the Florida Supreme Court extensively reviewed the findings of the trial court regarding the absence of this mitigating factor, and the trial court's rejection of the mitigating factor of age, under the circumstances. See Daugherty,419 So.2d at 1070-1071. Therefore, Respondents submit that the Petitioner was not denied an independent reweighing or review of the statutory circumstances to determine whether the death sentence was supportable in this case.

3. Entire Record.

Respondents submit that the Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner before the Supreme Court of Florida. In his first petition for certiorari before this Court, Petitioner alleged this very same issue, which was rejected by this Court in its denial of his petition for writ of certiorari.

Under Florida Law, an indigent defendant is entitled at State expense to only those portions of the transcript which relate to the assignments of error [Statement of Judicial Acts to be Reviewed] filed with the trial court. Cueni v. State, 303 So.2d 411 (Fla. 1st DCA 1974), cert. denied, 310 So.2d 738 (Fla. 1975), U.S. cert. denied, 423 U.S. 837, 96 S.Ct. 64, 46 L.Ed. 2d 56 (1975). In the instant case, Petitioner's statement of judicial acts to be reviewed does not assert any issues concerning voir dire, sentencing instructions to the jury, arguments of counsel, or Petitioner's taped confession, which was played at the evidentiary hearing. Additionally, counsel for Petitioner never moved to supplement the record with these missing portions of the transcript as provided by Rule 9.200 (f), Florida Rules of Appellate Procedure.

While it is clear that an indigent is entitled to a free transcript on appeal, See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956), the state is not obligated to automatically supply a complete verbatim transcript. See Draper v. Washington, 372 U.S. 487, 495-496, 83 S.Ct. 774, 779, 9 L.Ed. 2d 899 (1963). In Moore v. Wainwright, 633 F.2d 406, 408 (5th Cir. 1981), the court held Florida's procedure, which limits a defendants right to a free transcript to only those portions pertinent to the assignments of error, [now referred to as statement of judicial acts to be reviewed] is not in itself unconstitutional. The Florida Supreme Court had before it and reviewed the entire record concerning issues raised by Petitioner in his direct appeal. Accordingly, the Court did not deny Petitioner the procedural safeguards afforded

other capital defendants in Florida.

B. Certain procedures for Appellate review of capital cases do not invoke the protections of the due process clause of the Fourteenth Amendment.

Respondents would agree that state statutes may create interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment. However, Respondents do not agree that the decisions of the Florida Supreme Court acknowledging proportionality review creates any interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment. Cases cited by Petitioner in support of his position involve state statutes creating procedural rights, and not decisional case law made in the absence of a statute. See Vitek v. Jones, 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed. 2d 552 (1980).

As in Pulley v. Harris, Section 921.141, Florida Statutes, does not require comparative proportionaltiy review or otherwise describe the nature of the appeal. It does provide that in the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating and mitigating circumstances in subsection (5) and (6). The purpose of Section 921.141 is to provide the trial court with a list of aggravating and mitigating circumstances in order for the court to engage in character analysis of the defendant to ascertain whether the penalty is called for in his or her particular case. See Elledge v. State, 346 So.2d 998, 1001 (Fla. 1977).

The Florida Supreme Court's review of capital cases is to determine whether there was substantial, competent evidence to support the trial court's finding of aggravating circumstances, to determine whether the sentence of death is justified. The Florida Supreme Court conducts proportionality review as an additional safeguard against arbitrarily imposed

death sentences. The Florida Legislature, contrary to Petitioner's allegation, has not created a right to proportionality review. Section 921.141, Florida Statutes provides for a bifurcated procedure and forcloses the death penalty unless the sentencing authority finds that at least one of eight statutory aggravating circumstances is present and is not outweighed by any mitigating circumstance. The Florida statute requires the sentencer (trial judge) to focus on the individual circumstances of each homicide and on each defendant. Proffitt v. Florida, supra, at 251. The function of the reviewing court, in this case the Florida Supreme Court, is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are supported by the record, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained. See Brown v. Wainwright, supra, at 1331.

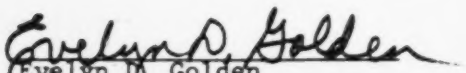
The fact that the Florida Supreme Court undertakes proportionality review is a good practice, however, this practice does not rise to the level of a state statute, and therefore it does not invoke the protections of the due process clause of the Fourteenth Amendment. As in Pulley, the Florida Statute does not require comparative proportionality review or otherwise describe the nature of the appeal. In Proffitt, this Court found that the Florida Statute provided meaningful appellate review. Therefore, this Court should deny Petitioner's petition for writ of certiorari to the Florida Supreme Court.

CONCLUSION

Based upon the foregoing arguments and citations of authority, Respondents respectfully requests this Court deny Petitioner's second petition for writ of certiorari to review the judgment of the Florida Supreme Court summarily denying his petition for writ of habeas corpus.

Respectfully submitted,

Jim Smith
Attorney General



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RESPONDENTS' APPENDIX

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EXHIBITS

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Supreme Court of Florida

TUESDAY, NOVEMBER 15, 1983

JEFFERY JOSEPH DAUGHERTY, **

Petitioner, ** CASE NO. 64,489

vs. **

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA, **

Respondent. **

The petitioner in the above cause has filed a Petition for Writ of Habeas Corpus, and the same having been duly considered, it is ordered that said Petition be and the same is hereby denied.

RECEIVED
NOV 17 1983
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

C
cc: Allan R. Freedman, Esquire
Richard H. Sayler, Esquire
and Daniel J. Thomasch, Esquire
Anthony P. Mario, Esquire
and Burton J. Green, Esquire
Hon. Jim Smith
Evelyn D. Golden, Esquire

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 268, ch. 19504, 1939; CGL 1940 Supp. 8663(267); s. 122, ch. 71-136.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19554, 1939; CGL 1940 Supp. 8863(248); s. 119, ch. 70-339; s. 1, ch. 72-72; s. 9, ch. 72-724; s. 1, ch. 74-379; s. 248, ch. 77-104; s. 1, ch. 77-174; s. 1, ch. 79-353; s. 177, ch. 83-216.

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 76-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 280a, ch. 19514, 1939; CGL 8426, 8427; CGL 1940 Supp. 8863(270); s. 123, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall be served consecutively unless the court directs that two or more of the sentences be served concurrently.

(2) A county court or circuit court of this state may direct that the sentence imposed by such court be served concurrently with a sentence imposed by a court of another state or of the United States. In such case, the Department of Corrections may designate the correctional institution of the other jurisdiction as the place for reception and confinement of such person and may also designate the place in Florida for reception and confinement of such person in the event that confinement in the other jurisdiction terminates before the expiration of the Florida sentence. Upon imposing such a sentence, the court shall notify the Florida Parole and Probation Commission as to the jurisdiction in which the sentence is to be served. Any prisoner so released to another jurisdiction shall be eligible for consideration for parole by the Florida Parole and Probation Commission pursuant to the provisions of chapter 947, except that the commission shall determine the presumptive parole release date and the effective parole release date by requesting such person's file from the receiving jurisdiction. Upon receiving such records, the commission shall determine these release dates based on the relevant information in that file and shall give credit toward reduction of the Florida sentence for gain-time granted by the jurisdiction where the inmate is serving the sentence. The Parole and Probation Commission may concur with the parole release decision of the jurisdiction granting parole and accepting supervision.

History.—s. 261, ch. 19554, 1939; CGL 1940 Supp. 8863(271); s. 124, ch. 70-339; s. 1, ch. 78-219; s. 24, ch. 79-3; s. 12, ch. 79-42; s. 1, ch. 79-310.

921.161 Sentence not to run until imposed; credit for county jail time after sentence; certificate of sheriff.—

(1) A sentence of imprisonment shall not begin to run before the date it is imposed, but the court imposing a sentence shall allow a defendant credit for all of the time he spent in the county jail before sentence. The credit must be for a specified period of time and shall be provided for in the sentence.

(2) In addition to other credits, a person sentenced to imprisonment in custody of the Department of Corrections shall receive credit on his sentence for all time spent between sentencing and being placed in custody of the department. When delivering a prisoner to the department, the sheriff shall certify to it in writing:

(a) The date the sentence was imposed and the date the prisoner was delivered to the department.

(b) The dates of any periods after sentence the prisoner was at liberty on bond.

(c) The dates and reasons for any other times the prisoner was at liberty after sentence.

The certificate shall be prima facie evidence of the facts certified.

History.—s. 1, ch. 63-457; ss. 19, 35, ch. 69-106; s. 123, ch. 70-339; s. 1, ch. 70-441; s. 1, ch. 73-71; s. 14, ch. 77-120; s. 20, ch. 79-3.

FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

NO. 83-6281

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

JEFFERY JOSEPH DAUGHERTY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, SECRETARY
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA, et. al.,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court and that I served Respondents' brief in opposition to petitioner's petition for a writ of certiorari upon counsel for petitioner pursuant to Supreme Court Rule 28 by placing a copy in the United States mail addressed to:

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Sid J. White, Clerk
Florida Supreme Court
Supreme Court Building
Tallahassee, Fl 32304

Done this 15th day of March, 1984.

Evelyn D. Golden
Evelyn D. Golden
Of Counsel

END OF DOCKET